

No. 35226

IN THE
Supreme Court of Appeals of West Virginia

ROSHAWN PANNELL,

Appellant,

v.

STATE OF WEST VIRGINIA,

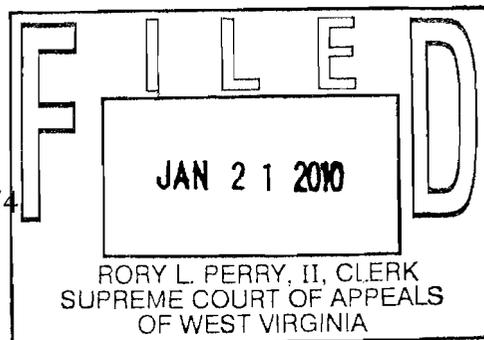
Appellee,

On Appeal From
The Circuit Court For Cabell County, West Virginia
Hon. Alfred E. Ferguson, Judge

APPELLANT'S REPLY TO APPELLEE'S RESPONSE

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ARGUMENT

A. The Court Violated Pannell's Right to a Fair Trial by Invading The Province of the Jury and Coercing a Guilty Verdict Through Time Constraint.

The State concedes that "unique time constraints" were present in this trial.

However, the State avoids this actual issue of Pannell's first ground of appeal: that the trial judge imposed a conscious time limit on the jury, thus coercing a guilty verdict.

Instead, the State throws out several issues to support its assertion there was no coercion:

1) The judge considered alternatives to imposing a time limit; 2) The text of *Allen* instruction was proper; and, 3) *Waldron* supports the State's conclusion.

1. The trial court's consideration of alternatives to imposing a time constraint on the jury's verdict has no bearing on whether the jury was coerced to reach a verdict within a time limit set by the court.

In this case, while the jury was deliberating on Friday evening, the trial judge imposed a conscious time demand. Faced with the fact that both a juror and the judge were leaving for a weeklong vacation the next morning, discarding all other options, the judge said go back in, decide tonight. The State contends that because the trial judge considered other options to avoid the conscious time demand that was imposed, it somehow vitiates that a conscious time demand was imposed. This should have no bearing on this Court's decision.

The State writes, which is true, that the trial judge considered: 1) continuing the trial until the following Monday with a substitute judge; 2) continuing the trial for one week until both the judge and juror returned for vacation; and, 3) pursuant to West Virginia Rule of Civil Procedure 12(b), asked the parties to consent to less than twelve jurors. However, just because the trial judge considered these options has no bearing on

the legal analysis of whether the action of imposing a time constraint on the jury was proper. This is akin to a defendant doctor in a medical malpractice case defending his case by testifying, “Well, I knew the proper standard of care, considered it, but didn’t have time to follow the proper standard of care because I had to go on vacation. Therefore I deviated from the standard of care and chose the quickest procedure because it could have worked.” Case closed, pay the plaintiff.

Further, with regard to the 12(b) argument, the West Virginia Constitution guarantees criminal defendants the right to a jury trial by twelve peers. *West Virginia Constitution, Article III, Sec. 14*. To suggest that the time constraint is somehow vitiated because the defendant would not relinquish his constitutional right should have no bearing on this Court’s decision.

The consideration of alternatives likely had the opposite effect that the State argues. The initial discussion of alternatives was outside of the presence of the jury. However, the trial court informed the jury that it had considered alternatives and there was nothing left to do but make a decision tonight.

At 4:49 on Friday afternoon, the jury sent out a note asking, “We are not making any ground in either direction. Can we continue Monday?” (Tr. Transcript, pp. 870-1). Earlier in the trial, the court had stated to counsel that the jury could go home anytime they wished. However, the Court responded at 5:58 p.m. on Friday evening, “if we could we would send you home and bring you back Monday, but that’s just not possible.” (Tr. Transcript, pp. 889).

2. That the text of the trial court’s *Allen* instruction was proper has no bearing on whether the jury was coerced to reach a verdict within a time limit set by the court.

Pannell does not, and never did, contend that the text of the modified *Allen* charge was improper. This issue is simply a red herring. While the actual giving of the *Allen* charge likely contributed to the atmosphere that this case will be finished tonight, on Friday evening, it is not an error standing alone. It merely contributed to the totality of the circumstances that the trial court imposed a conscious time demand for the jury's verdict on Friday night.

3. *Waldron* is clearly distinguishable

Although the *Waldron* decision, with respect to the time constraint issue does not recite many facts, it is clearly distinguishable from the case at bar. In *Waldron*, the trial judge told the jury a date when he expected to finish the trial and on certain days asked if the jury could continue past five o'clock. *State v. Waldron*, 218 W.Va. 450, 459, 624 S.E.2d 887, 896 (2005) However, *Waldron* found that, rather than setting a specific time limit for a jury verdict, the trial judge was simply "asking the jury members if they could commit to such a time frame and requesting input on the availability of their schedules." *Id.* In the case at bar, the trial judge stated early on that he expected the trial to finish in one or two days and inquired of the jurors' schedules. Had it stopped there, appellant's argument would fail. But this is not the crux of Pannell's argument. Quite simply, the trial court imposed a time limit for the jury's verdict and the State does not refute this fact.

B. Appellant's Robbery Convictions Should be Overturned Because the Evidence Did Not Prove Beyond A Reasonable Doubt that Mr. Pannell Committed Any Elements of 1st Degree Robbery, Committed Any Act to Aid and Abet the Robbery or Shared the Criminal Intent of the Principal in the First Degree.

The State's response to this issue mainly recites the same facts and law already cited by the Appellant. In support of its argument, the State simply states that no one "just engages in the activity of jumping up and down or 'getting pumped up' on a sidewalk at approximately 3 a.m." This conclusory statement omits several steps of Pannell's legal analysis of this issue. Additionally, West Virginia law provides that for conviction under the aiding and abetting theory "[t]he State must demonstrate that the defendant shared the criminal intent of the principal in the first degree." Nowhere does the State dispute this law or provide any fact that proves Pannell shared the criminal intent of his co-defendant.

C. Appellant's Robbery Conviction on Count II Should Be Overturned Because the Alleged Victim Did Not Have Any Personal Property or Money Stolen and The Jury Was Not Instructed on Attempted Robbery.

The State refutes this issue by contending that it is "factually incorrect" that there is insufficient evidence regarding the robbery of Andrew Chiles. As stated in Appellant's brief, Andrew Chiles dropped his wallet but it was not taken, nor were any of its contents. (See Tr. Transcript, pp. 468)(Q. So, your wallet never came up missing? A. No, my wallet was there and intact...Q. Even the money? A. Yeah, even the money was left in it.) No evidence was presented to the jury that displayed Mr. Pannell, or his co-defendant, intended to permanently deprive Andrew Chiles of the ownership of his wallet or its contents. See *State v. Collins*, 174 W.Va. 767, 770 (1985).

Next the State contends that even if the facts are insufficient for robbery, and thus only support attempted robbery, the issue is not properly briefed and therefore relief should not be granted. This argument is disingenuous. If someone is convicted of a crime for which no jury instruction was given, they cannot be convicted of the crime. It

is also further evidence that the jury verdict was coerced through time constraint. The jury was obviously so ready to conclude the trial that it convicted Pannell of a crime which it had no instruction.

D. Conclusion

Petitioner prays that this Court will reverse his convictions and sentence in this matter, and remand this case to the Circuit Court either with directions to enter an Order granting Petitioner's Motion for Judgment of Acquittal or his Motion for a New Trial.

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By Counsel



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CERTIFICATE OF SERVICE

I, Richard W. Weston, do hereby verify that I served the foregoing “**Appellant’s Reply to Appellee’s Response**” by U.S. Mail, postage prepaid, this 19th day of January, 2010, addressed to the following:

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